UNITED STATES
v.
MILTON WICHNER

IBLA 77-440 Decided May 30, 1978

Appeal from decision by Administrative Law Judge R. M. Steiner declaring placer and lode mining claims null and void for lack of discovery. S-5326.

Affirmed.

1. Mining Claims: Discovery: Generally

A discovery of a valuable mineral deposit has been made where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine.

2. Administrative Procedure: Burden of Proof -- Mining Claims: Contests -- Mining Claims: Discovery: Generally
When the Government contests a mining claim on a charge of no discovery, it assumes the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made and still exists within the limits of the claim.

3. Mining Claims: Determination of Validity -- Mining Claims: Discovery: Marketability -- Rules of Practice: Evidence

What men have or have not done over a period of years is proper evidence as to the conduct of a prudent man in the same or very

nearly the same circumstances. Where mining claims had been held for many years and little or no commercial production was achieved on such claims, it may be concluded that no prudent man would have been justified in the belief that the mineral deposit could be developed, extracted, and marketed at a reasonable profit.

4. Mining Claims: Discovery: Generally -- Mining Claims: Withdrawn Land -- Withdrawals and Reservations: Effect of

Where land is withdrawn from the operation of the mining laws subsequent to the location of a mining claim, the validity of the claim cannot be recognized unless the claim was supported by a valid discovery at the time of the withdrawal. In addition, even though there may have been a proper discovery at the time of a withdrawal or at some other time in the past, a mining claim cannot be considered valid unless the claim is at present supported by a sufficient discovery. The loss of the discovery, either through exhaustion of the minerals, changes in economic conditions, or other circumstances, results in the loss of the location.

5. Withdrawals and Reservations: Effect of

Lands which have been withdrawn from entry under some or all of the public land laws remain so withdrawn until there is a formal revocation or modification of the order of withdrawal, and it is immaterial whether the lands are presently being used for the purpose for which they were withdrawn.

6. Administrative Procedure: Generally -- Rules of Practice: Appeals: Discovery -- Rules of Practice: Hearings

The Federal Rules of Civil Procedure are not binding on administrative agencies.

APPEARANCES: Milton Wichner, Esq., of Los Angeles, California, pro se, Charles F. Lawrence, Esq., Office of General Counsel, U.S. Department of Agriculture, San Francisco, California, for contestant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Milton Wichner has appealed from a decision by Administrative Law Judge R. M. Steiner dated May 31, 1977, which declared the Rose Hill and Mayflower placer mining claims and the Mayflower and Jessie D. quartz mining claims null and void for lack of discovery of a valuable mineral deposit. The claims are located in secs. 29 and 30, T. 5 N., R. 15 W., S. B. M., Los Angeles County, California.

This proceeding was initiated by a contest complaint filed by the Bureau of Land Management which charged:

> A. There was no discovery within the boundaries of the claims on May 29, 1928 and at subsequent times.
>
> B. There was no discovery of common variety mineral materials within the boundaries of the claims on July 23, 1955 and at subsequent times.
>
> C. The land within the claims is nonmineral in character.
>
> D. The labor or improvements required by 30 U.S. Code Section 28 has not been performed or made on or for such claims.
>
> E. The land embraced within the claims is not held in good faith for mining purposes.

[1-4] The Administrative Law Judge found that no discovery existed on the subject claims prior to the withdrawal of the lands from mining location by the Act of May 29, 1928, 43 Stat. 956. The specific wording of the withdrawal in section 2 preserved only those mining claims "hereafter maintained in accordance with such [mining] laws." The Judge found the evidence does not prove there was a profitable mining operation on the claims as of the date of withdrawal. He concluded that even if, arguendo, there was a discovery on the critical date, the subject claims lapsed into the withdrawal for the reason that many years elapsed after 1930 without development of, or production from the deposits exposed thereon. Since he found this conclusion dispositive of the proceeding, he did not rule on the other issues raised by the pleadings.

The Judge's decision sets out in detail a summary of the testimony and the evidence and applicable law as well as his findings and conclusions. We are in agreement with his decision, and, therefore, we adopt it as the decision of this Board. A copy of it is attached hereto.

We wish to emphasize that the Judge's determination of no discovery as of the date of withdrawal, i.e., May 29, 1928, is controlling in the disposition of this case. The cases are legion which firmly establish the principle that where a mining claim occupies land which has subsequently been withdrawn from the operation of the mining laws the validity of the claim must be tested by the value of the mineral deposit as of the date of the withdrawal, as well as of the date of the hearing. Andrew J. Vanderpoel, 33 IBLA 248 (1978); United States v. Netherlin, 33 IBLA 86 (1978); United States v. Rodgers, 32 IBLA 77 (1977); United States v. Arcand, 23 IBLA 226 (1976); United States v. Fleming, 20 IBLA 83 (1975). If the claim was not supported at the dates of the segregation and withdrawal by a qualifying discovery of a valuable mineral deposit, the land within its boundaries would not be excepted from it and the claim could not thereafter become valid even though the value of the deposit increased due to a change in the market. See United States v. Arcand, supra. Therefore, where there was no discovery as of the date of withdrawal, no matter what transpired afterward, appellant cannot prove the validity of his claims. From our review of the record before us, that is the situation present in this case. The Judge correctly held the mining claims invalid for this reason alone without going further.

Appellant cites the recent case of Charlestone v. United States, 553 F.2d 1209 (1977), cert. granted U.S. to show similarities in the treatment of discovery and continued marketability in relation to the withdrawal made by the Act of July 23, 1955, and the withdrawal in effect in the instant case. In Charlestone, which concerned sand and gravel claims located in 1942 in an area near Las Vegas, Nevada, the court concluded there was not substantial evidence in the record to support the Government's finding of a lack of discovery as of July 23, 1955. The court rejected testimony of the Government's mining engineer that work conducted on the claims over a period of time was sporadic operation. The engineer had gathered secondhand information from other competing sand and gravel operators and from visual inspections of the claims made many years after the crucial period for production and marketing of the sand and gravel.

In the case at hand, however, substantially all the evidence of the failure of the operation, lack of continued marketability, and ineffectual sales efforts was supplied by claimant and claimant's own witness, E. S. Gates, who was directly involved with the working of the claims during the crucial years (Tr. 252-320). The basis of the Government's case was admittedly taken from this direct evidence. This evidence showed a substantial investment by the claimant's predecessor that resulted in a losing operation which folded soon after the effective date of withdrawal. Unlike Charlestone, there is here, without question, sufficient information in the record to support the Judge's conclusion.

It is apparent that little or no work was conducted on the Rose Hill and the Mayflower claims in the height of the alleged best years of the Gates "Bridget" cleanser operation. It is clear that these claims could not stand by themselves to show sufficient evidence to prove a discovery based on the production and sales of Bridget cleanser. All of the tuff that was cited as used for production, (5,000 to 8,000 tons), was taken from the Jesse D. lode claim (Tr. 308). When asked whether any removals of any substantial quantity were taken from the Rose Hill or the Mayflower claim, E. S. Gates testified:

> Nothing much more than to see that assessment work was done and that was done by others mostly and the main work -- well, we were under the impression that work for assessment could be done on one of the claims as long as it was joined into a group of -- well, a [contiguous] group and whether that is right according to rules and laws, I'm not a lawyer and I'm not an engineer but that's what we were told and that's what I have believed.

(Tr. 309). When asked as to the development of the Mayflower claim, Gates admitted that the Mayflower was merely held for future development stating:

> Yes, it was to be held as part of the group claims because it has a lot of this now designated tuff on it and nothing in comparison to what it's been here and that's more than I have even dreamt of being there.
>
> Q. What I mean is, did you ever make any concrete engineering plans of going in and removing the material?
>
> A. For future development -- well, only to keep up the ownership of it.
>
> Q. Had you made sales of tuff presumably, would that have come from the Rose Hill?
>
> A. That's where we got our material from.

(Tr. 311).

As to the very heart of the cleanser operation on the Jesse D. claim, Gates' testimony, including a first-hand description of the operation and the lack of development after 1930, set the foundation for the Judge's rationale. Gates admitted his family had made a sizeable investment of over $150,000 (Tr. 318). This proved to be a questionable investment resulting in financial loss. Appellant

blames the business failure on outside independent economic factors, i.e., the depression years, law suits involving the trade name "Bridget," and the ill health of Gates' father. The fact remains, however, that these factors certainly did not maintain a continuing influence for the ensuing 40-year period during which the cleanser manufacturing business was never resumed. The conclusion is impelled that if this business were half as profitable as appellant would have us believe, some prudent operator would have been more than willing to invest time and money to take over such a successful and profitable going operation. The long period of inactivity speaks for itself. Appellant's line of argument does not square with the reality of the situation.

Appellant points to many inaccuracies of the transcription of Mr. Gates' testimony at the hearing and has provided a corrected version on appeal. The Government has consented to all the corrections. We have reviewed the cited changes in the transcript and find they do not change the substantive content of Mr. Gates' testimony. These corrections do not materially affect the key facts relied upon for the decision and do not alter the outcome of the case.

[5] Appellant challenges the current need for the purposes for which the withdrawal of May 29, 1928, was undertaken, which was to conserve water resources and to encourage reforestation of the water shed of Los Angeles County. He contends the lands in question have no bearing on conservation of water, nor have they been used to encourage reforestation. Whether or not the lands have been used for this intended purpose does not change the segregative effect of the withdrawal order. It has long been held that lands which have been withdrawn from entry under some or all of the public land laws remain so withdrawn until there is a formal revocation or modification of the order of withdrawal, and it is immaterial whether the lands are presently being used for the purpose for which they were withdrawn. Tenneco Oil Co., 8 IBLA 282 (1972); Oliver and Robert A. Reese, Silver Associates, Inc., 4 IBLA 261 (1972); David W. Harper et al., 74 I.D. 141 (1967).

[6] Appellant's charges that the Government willfully suppressed evidence resulting in a denial of due process is totally without merit and does not warrant further lengthy discussion herein. It suffices to state that the Department's regulations applicable to public land hearings, 43 CFR Part 4, Subpart E, are silent as to any rules of discovery. The specific requirements for discovery of the Federal Rules of Civil Procedure are not controlling in proceedings conducted in accordance with these hearing procedures. See Appeal of Carl W. Olson & Sons Co. 81 I.D. 157, 160 (note 7) (1974). After examining the cited interrogatories and the Government's response, it appears that adequate information was tendered from which appellant

could have gone further in the preparation of his case. Moreover, during the course of the hearing the Government's files were also made available for his use. In any event, appellant has failed to demonstrate how the procedures followed caused him a hardship or resulted in prejudice to his case.

Therefore pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

_____
Martin Ritvo
Administrative Judge

We concur:

_____
Frederick Fishman
Administrative Judge

_____
Anne Poindexter Lewis
Administrative Judge

APPENDIX A

May 31, 1977

United States of America,	:	Contest No. S-5326
	:	
Contestant	:	Involving ROSE HILL and MAYFLOWER
	:	Placer Mining Claims and
v.	:	MAYFLOWER and JESSIE D. Quartz
	:	Mining Claims, located in
Milton Wichner,	:	Secs. 29 and 30, T. 5 N.,
	:	R. 15 W., S.B.M.,
Contestee	:	Los Angeles County, California

DECISION

Appearances: Charles F. Lawrence, Esq., U. S. Department of Agriculture, for the Contestant;

Milton Wichner, Esq., pro se.

Before: Administrative Law Judge Steiner.

This is an action brought by the Bureau of Land Management pursuant to the Hearings and Appeals Procedures of the Department of the Interior, 43 C.F.R. Part 4, to determine the validity of the above-named mining claims.
The Contestant filed a Complaint herein on October 10, 1972, alleging, inter alia, as follows:

"A. There was no discovery within the boundaries of the claims on May 29, 1928 and at subsequent times.

B. There was no discovery of common variety mineral materials within the boundaries of the claims on July 23, 1955 and at subsequent times.

C. The land within the claims is nonmineral in character.

D. The labor or improvements required by 30 U.S. Code Section 28 has not been performed or made on or for such claims.

E. The land embraced within the claims is not held in good faith for mining purposes."

The Contestee filed a timely Answer generally denying the foregoing allegations of the Complaint and alleging:

"a. That there was discovery within the boundaries of the claims on May 29, 1928, and subsequently;

b. That there was discovery of common variety mineral materials within the boundaries of the claims on July 23, 1955;

c. That the land within the claims is mineral in character;

d. That the labor and improvements required by 30 U.S. Code § 28 have been performed or made on or for such claims;

e. That the land embraced within the claims is held in good faith for mining purposes."

The Contestee further alleged in the Answer that paragraphs A, B, C, D, and E of the Complaint fail to state a claim upon which relief can be granted; that the Contestant is estopped from claiming that the claims are invalid; that the Contestant seeks to deprive the Contestee of his property without due process of law; that the Contestant waived its right to contest the validity of the claims; that Contestee and his grantors have held and worked the said claims for more than five years, which is the period of time prescribed by the statute of limitations of the State of California where the claims are situated and that under the provisions of 30 U.S. Code § 38, Contestee had established a right to patents and Contestant has no right to impair Contestee's rights in and to his mining properties; that the Department of the Interior lacks power and jurisdiction to contest unpatented mining claims on the ground that there has been a failure to perform the annual assessment work; that the issue of discovery and performance of annual assessment work on the ROSE HILL Placer Mining Claim is res judicata by virtue of the judgment in case No. 585193 in the Superior Court of the State of California, in and for the County of Los Angeles, captioned: EUGENE S. GATES and BROOKSIDE QUARRIES, INC., a corporation, plaintiffs, vs. ROY W. SPURRIER, et al., defendants, an adverse suit in support of an adverse claim filed with the Manager of the Land Office at Los Angeles,

California, on March 19, 1951, in the matter of the application of ROY W. SPURRIER for a patent to COARSE GOLD NO. 1 and COARSE GOLD NO. 2 Mining Claims, embracing the W-1/2 of the W-1/2 of the NE-1/4 of Section 29, Township 5 North, Range 15 West, S.B.M., County of Los Angeles, State of California; that by said judgment, it was found and adjudicated that there had been a discovery of valuable minerals within the ROSE HILL Placer Mining Claim and that Contestee's predecessors in title have performed work and made improvements upon the said mining claim having a value in excess of $100.00 a year, or have filed intentions to hold said mining claims under the laws of the United States of America and suspending performance of said assessment work for each and every year from 1919 through 1952; and that Contestant has heretofore, by various proceedings, determined that each of said mining claims were valid and subsisting mining claims; that plaintiff and his predecessors in title have continuously maintained the possession thereof, have performed the annual assessment work and have made discoveries and have the exclusive right to possession except for the vegetative surface resources, and that plaintiff has established an indefeasible right to a mineral patent of each of his said mining claims under the laws of the United States.

The Contestee also filed a motion to strike the contest complaint and a motion to dismiss the contest. The motions were denied by Order of Administrative Law Judge Graydon E. Holt dated April 17, 1973. A pre-hearing conference was held by Judge Holt on June 18, 1973, and the Contestee's deposition was taken on the same date. Answers to interrogatories filed by the Contestee were submitted on August 27, 1973.
A hearing was held in Los Angeles, California, on May 7, 8, 9, and October 23, 1975. Extensive briefs were subsequently filed by both parties.

Gilbert H. Easter, Jr. testified that he visited the subject claims on December 15, 1971, with Norman Harris concerning the issuance by the Forest Service of special use permits for road access to the Rose Hill and Mayflower claims. By letter dated January 14, 1972, the Contestee was advised of the position of the Forest Service that the claims were not valid. (Exhibit No. 24). He also made a search of the Los Angeles County records for recording of proofs of labor on the contested claims. (Exhibit No. 25).

Gerald E. Gould, after having been duly qualified as a mining engineer, testified that he examined the subject claims on numerous occasions in 1971, 1972, 1973, and 1975. He was advised that the claims were located for tuff, gold, and other precious metals. Tuff had been removed from the Rose Hill and Jessie D. claims in the early 1920's for making scouring powder. By the middle or late 1920's, that production had ceased.

Three samples taken from the claims contained extremely minor quantities of gold. (Tr. 79). Five additional samples were taken in 1973. He stated that there was no evidence of a valuable deposit of gold on any of the four contested claims. He believed there was no probability or possibility of developing a paying mine based on gold. (Tr. 89).

He observed several outcrops of tuff on the claims. Some mining had been done on a tuff bed in an adit on the Jessie D. claim. He identified a number of photographs depicting the sites which were sampled for gold, and beds of tuff, some massive. (Exhibits No. 32, 33, 34, and 35).

He stated that there are two major tuff beds on the claims. The bed that has been worked on the Jessie D. claim (overlapped by the Rose Hill claim) is light colored tuff exposed for a thousand feet or more. The second bed is not nearly so well exposed because there has been essentially no excavation on it. He also found other exposures of white tuff.

He estimated that approximately one thousand cubic yards had been removed from the adit on the Jessie D. claim which was partially caved. It was his opinion that there were sufficient tuff deposits to sustain a production of a few hundred tons a month for the scouring powder market.

Keith W. Ehlert testified that he had a Bachelor of Science Degree, had applied for a master's degree, and was on the faculty of California State University at Los Angeles, teaching geology. He had prepared a thesis on the depositional environment of the Mint Canyon Formation which was deposited with the Mint Canyon tuff beds which are the subject of this contest. He identified a map, Exhibit B, depicting the outcrop pattern of the tuff beds in the area of the claims. The outcropping is from three to seven feet thick. (Tr. 161). The tuff weighs about 127 pounds per cubic foot.

There are two kinds of tuff on the claims, altered and vitric. The vitric tuff is identical to that deposited on adjacent Forest lands presently used for chinchilla dust. There are extensive tuff beds in the Mint Canyon Formation occurring east and south of the subject deposits. He identified those deposits as tuffite and described them as a mixture of sedimentary debris and tuffaceous material, with totally different physical properties. Both the vitric and altered tuffs on the claims are of a color not found in the area except on Forest lands. The altered tuff is unique in that it consists of glass shards and contains no sedimentary detritus. (Tr. 166). Most tuff beds have an off-white, yellowish, or greenish tint, but the subject tuff is white.

It was his opinion that a minimum of 1,155,000 tons of vitric tuff, and 3,800,000 tons of altered tuff occur on the claims.

He stated that the conglomerates of the Mint Canyon Formation which are twelve million years old could contain gold. "How much I don't know and the problem of extracting it I don't know what that is but I do feel that it could contain gold and very likely it does." (Tr. 173). He did not sample, pan, or look for gold on the claims. (Tr. 204).

Robert K. Foster testified that he has owned, operated, leased, and sold mining claims for more than forty years. He had done assessment work on the claims, six or seven days each year, since 1964. He took samples from many exposed layers of gravel. The samples were panned by his wife because "she has a gentle touch and she takes her time." (Tr. 223). There were "gold grains" in every sample he took, not as big as wheat grains, "less than a millimeter." Based upon his examination, he expressed the following opinion:

> "A little over 2,000,000 cubic yards should be the content of these gravels and at the present price of gold now, the terras gravels would run about $5.00 a ton and this finer gold would probably run closer to $2.00 a ton so it was over 2,000,000 per yard and not per ton, and over 2,000,000 cubic yards would be over $4,000,000 worth of gold contained in there and I don't believe the cost of operating it would be much over $1.00 a ton so it leaves a $1.00 a ton profit.
>
> * * * * *
>
> Yes, there is an overburden on them and I figured this amount of tonnage was not over 4 to 1 which is a rather moderate figure, in other words, in -- well, if I extended it further into the steeper hill then the gravel may still be there but I figured the overburden is getting a little steep and I didn't estimate that in the tonnage at all." (Tr. 224).

The gravels had been worked to some extent, and he found remnants of an old mill. Every time he was on the claims doing assessment work, he found gold in the gravels along the creek bed.

Eugene S. Gates testified that he was a locator of the Mayflower, Rose Hill, and Jessie D. claims. He had mining operations in the United States including a tungsten mill in Nevada during World War II, and conducted prospecting and plant designing in Mexico during the past forty years. The Rose Hill claim was located on July 30, 1919, the Mayflower claim on

May 3, 1920. Prior to that time, he had been converting an olive factory in Boquet, California, into a cleansing powder factory. The sum of $25,000 was paid to one Mr. Ferree for the claims on April 29, 1919. A processing plant on Fernando Road in Pacoima was purchased. The building was equipped with modern equipment, a rock crusher, a set of rolls, and two pulverizing mills. A scouring powder was produced and marketed under the label "Bridget". They also produced and sold a silver polish under the label "Revils", silver spelled backwards. The scouring powder was sold for ten cents for a fourteen ounce can in competition with Old Dutch Cleanser. Production was scheduled at five tons per day. The tuff was removed from a 150-180 foot tunnel on the Jessie D. claim. The production occurred "in the early '20's, just as soon as we got our mill together." (Tr. 273). He estimated that there was a $40.00 per ton profit on a five ton a day operation.

The trade name "Bridget" was discontinued and operations ceased for a short time in 1923. The product was then sold under the name "Gates
Cleanser" until 1930. While the costly change in labels was in process, he did have some bulk sales of cleanser to schools, office buildings, and hospitals. About two hundred tons of tuff was also sold to a distributor in Texas where it was ground and sold in bulk. His father, because of health reasons, got out of the scouring powder business. "* * * the family thought that it was best that we cease from going further with it." "* * * we didn't go on with it but we didn't want to lose our mining property and had no intentions of it at that time but to pick it up at a later time with the use of it, and about that time the world depression was coming, I mean, it was on a broad scale." "* * * then it was a plain factor that a cleanser couldn't be sold." (Tr. 284).

His estimate that the tuff was marketable until the 1930's was based on the fact that, "* * * these Hill boys in Texas still had some of that product on hand and they came to me for advice on how they could go about getting rid of it." (Tr. 284). He stated that about seven or eight thousand tons of tuff had been used. The claims were subsequently conveyed to Brookside quarries, a Nevada Corporation.

A search for gold was made on the claims in 1927 or 1928. One summer, a student erected a sluice box and purportedly removed five thousand dollars worth of gold. In 1928, he observed a nugget "as big as my thumb" in one wheelbarrow of material. He gathered a little bottle of gold weighing at least two ounces in one afternoon. (Tr. 293). A well produced sufficient water for a sluice box. A reservoir was constructed to store water for mining or sluicing.

On cross-examination, he stated that although they were producing and selling cleanser, the capital investment made to build a plant and other negative factors caused the entire cleanser operation to end with a

net loss. (Tr. 302). It was his opinion that the expenditures for the development, production, and advertising of the tuff products were at least $150,000.00, probably more. (Tr. 318). Following the years 1930 and 1931, he did not seek out any markets for the tuff, and he was not aware of any attempts to purchase the tuff.

No material was removed from the claim in any substantial quantity after 1930 until Mr. Wichner took ownership. (Tr. 305-306). The eight thousand tons of tuff he referred to earlier were removed from "the stope of the left-hand drift mainly" on the Jessie D. claim. The Mayflower claim was to be held for future development.

The company did not receive the $5,000.00 worth of gold recovered by the student in 1928. The student was associated with the witness's partner in the undertaking business. He stated:

> "* * * my father had benevolence for this man and that's how it came about. Just like this bottle of gold Mr. Wichner was telling you about. We use this in the Spurier's case and it disappeared in the courtroom. We had samples of it around and even used to give it to friends to make themselves something. It wasn't a lot but it was utterly impossible to go up there in those days and work and not go up to the side walls of the stream bed and not come out with pannings and I'm not talking about flour gold, I'm talking about course gold and that's how it got its name Course Gold Gulch in the old days." (Tr. 313).

After the gold had been recovered, the student went back to school. He did not know the location of the sites from which the gold-bearing materials were taken.

Dr. Norman Harris, who holds a doctor's degree in ceramic engineering, testified that the Blue Cloud Mineral Company was formed by his father and a partner in 1950. The company produces material for the cleaning of furs of chinchilla and other furs which could not be cleaned with water or other existing cleansers. The material is produced from tuff and cleans by absorption. The tuff material was a gray tuff deposited in Boquet Canyon. The tuff has unusual color and textures and has a degree of abrasiveness and absorption properties. It is marketed under the name "Blue Cloud Chinchilla Bath" throughout the United States and the rest of the world.

The tuff was removed from the Swartz property beginning in 1952 and continuing through to the present. He also removed tuff from adjoining land beginning in the early 1960's and subsequently received patent to that

land, 120 acres. He constructed a mill on the patented land. He had prepared a graph showing the volume of material sold and the monetary value thereof, Exhibit J. The tuff came from the Swartz property and land leased from the Forest Service. He summarized the exhibit as follows:

> "1951, $20,000.00 sold for 250 tons processed material. 1952, $30,000.00 for 380 tons of material. 1953, $51,000.00 for 625 tons. 1954, $58,000.00 for 710 tons. 1955, $43,000.00 for 520 tons. 1956, $34,000.00 410 tons. 1957, $26,000.00 for 315 tons. 1958, $27,000.00 for 330 tons. 1959, $23,000.00 for 295 tons. 1960, $24,000.00 for 300 tons. 1961, $20,000.00 for 250 tons. 1962, $19,000.00 for 240 tons. 1963, $25,000.00 for 310 tons." (Tr. 339).

After 1961, he continued to remove material from the leased Forest lands. In the early 1960's, he began taking tuff from three forty acre claims which were subsequently patented. Also, beginning in the 1960's, and until 1970, tuff was transported to Los Angeles for processing at another facility. The processing cost was fifteen dollars per ton. The average sale price was eighty dollars per ton. A royalty of one dollar per ton was paid to the Forest Service. Hauling costs to Los Angeles were approximately three dollars per ton. "We had additional costs per containers and advertisings and we had a cost figure of $46.50 a ton." (Tr. 341). In 1970, he built a complete processing plant for crushing, drying, milling, screening, and packaging of the tuff. He was interested in the white altered tuff deposits on the subject claims. It could be used for abrasive, ceramic, and agricultural applications.

In 1971, he submitted samples of the tuff to Procter and Gamble for possible use in Lava soap. In 1974, he was advised by Procter and Gamble that it would buy ninety-two tons, or four truckloads, of tuff at $52.50 per ton. Exhibit N is a copy of a purchase order from Procter and Gamble for five thousand pounds of pumice. Attached to the exhibit is a check in the sum of $191.25, dated February 15, 1974, made payable to Blue Cloud Mineral Co. The material was removed from the Rose Hill claim. Two tons were delivered on October 29, 1974, for plant testing at Long Beach, California, 17.8 tons on December 24, 1974, and 24 tons on February 28, 1975. (Exhibit P, Q, and R). After December 1, 1974, the price was raised to sixty dollars per ton. The company had previously purchased material from the Rhodes Company in New Mexico. He did not supply Procter and Gamble with material after February, 1975, because of other orders. As of May, 1975, the company had ordered fifty additional tons. The Los Angeles Soap Company "definitely wanted to purchase" material similar to that purchased by Procter and Gamble, also to be used as an ingredient of soap. He thought that the two companies would buy 3,000 tons of material per year.

He had made firing tests on the gray and the white tuff. The tests indicate that the tuff could have been utilized as a ceramic material. It had an interesting property of self-glazing, forming a glazed surface without the addition of glaze material. The gray tuff could be roofing material. Similar material on lands adjoining his private property had been used for the production of roofing materials.

The white tuff is unique in that its color is very nearly white, the thickness of the bed is very substantial, the visual impurities are minor, and it has moderate abrasive properties. Chinchilla bath, cage litter, and chewing blocks were also produced and marketed by the Blue Cloud Mineral Co.

He stated that, since 1951, approximately 10,605 tons of Blue Cloud material had been sold for $849,337.00. He made a profit from these sales. (Tr. 373). The gray tuff was tested for uses for soil conditioner. One of these products was Blue Cloud Pot Mix, which has not yet been distributed. The Blue Cloud Mineral Co. leased the Rose Hill and Mayflower claims from Milton Wichner on October 13, 1971. (Exhibit LL). He intended to work the tuff deposits, for which there were adequate markets, at a profit.

On cross-examination, he stated that none of the material sold for cage litter and chewing blocks came from the subject claims but from his adjacent patented claims. All of the tuff material above ground in one quarry on the patented claims has been removed. At least one-half of the tuff above ground in a second quarry has been removed. He did not know when the tuff deposit exposed in the second quarry would be depleted. He had not determined the exact tonnage of blue-gray material exposed on a third patented claim. He conceived the idea of selling the blue-gray material as cage litter since 1970. He could not recall exactly when he conceived the idea of selling chewing blocks, but it was about the same time, after 1970.

His sales to Procter and Gamble totaled 46-1/2 tons. Specific computations of his costs have not been made. (Tr. 402). The white tuff taken from the Rose Hill claim for the soap market could be used in the other markets developing in the care of chinchillas.

He learned of the Rose Hill and Mayflower claims in the early 1960's when Milton Wichner was involved with his Blue Cloud claims.

He stated that 6,190 tons of material was removed from Forest Service lands between 1954 and 1971. There was a period between 1966 and 1975 when the minimum royalty of $100 was paid but less than the minimum tonnage was extracted. In 1974, the total was approximately 55 tons. (Tr. 411).

He is currently mining white tuff on the lower level on his own claim, but the future removals of white tuff would be from the Rose Hill or Mayflower claims. It would be more costly to mine white tuff from his own claims. He had not conducted any tests to determine the extent of the white tuff deposits on his own claims nor on the contested claims other than visual observation of the exposures.

He has agreed to pay a royalty of ten cents per ton for the first one hundred thousand tons and fifty cents per ton exceeding that amount of material from the Rose Hill and Mayflower claims. (Tr. 418). He pays the Forest Service one dollar per ton for blue-gray material which is the same type as that occurring on the contested claims.

When Mr. Foster was panning for gold, the witness saw "a quantitative amount" of gold in the pans. (Tr. 419).

Eugene F. Grossman testified that he was a vice-president and a member of the board of directors of Argentum Consolidated Mines, Inc., in 1952, and is now president of that firm. In its annual report dated January 31, 1955, (Exhibit MM) the company lists the Rose Hill and Mayflower claims among other claims and refers to an exposure of silicious kaolin 1400 feet long. During the years 1955 to 1967, he contacted Winfield China to promote the kaolin for ceramic uses. He also contacted other persons, one of whom contemplated using the material for oil filtration.

On cross-examination, he stated that none of the firms or persons contacted purchased or offered to purchase any kaolin material. He knew of no sales from the contested claims. (Tr. 432).

Milton Wichner testified that he visited the Rose Hill and Mayflower claims on numerous occasions after April, 1951, representing the former owners. He had represented the Harris family in securing patent to the Blue Cloud claims previously referred to. A patent was issued following submission of evidence of the marketing and profitable sale of tuff as a chinchilla dust. He identified a letter received by Norman Harris from the Bureau of Land Management in response to his request to purchase 200 tons of volcanic ash deposited on Federal lands administered by the Bureau, Exhibit SS, dated June 2, 1964. The letter states, in part:

> "A mineral examination shows the material to possess a distinct economic value over and above the normal uses of deposits of tuffaceous materials, therefore, it is not a common variety mineral subject to sale under the Material Sales Act, and is found to be locatable."

He stated that the tuff from which chinchilla dust is made occurs on the Harris patented claims, the BLM lands described in Exhibit SS and the Rose Hill and Mayflower claims. "* * * the Blue Cloud Company has been continuously in operation to the present date and constituted a market for the blue-gray tuff located on my claim." (Tr. 465). However, none of the tuff on the contested claims was sold until sometime after he entered into a lease with Harris in 1971.

He acquired the contested claims at a Marshal's sale on a judgment which he received against Brookside Quarries. He stated:

> "As an owner it is my opinion that there are gold values in the claims in areas other than the areas tested by Forest Service, and I am referring to virgin areas in stream bottoms. However, at this time I am not urging that there has been a discovery of gold in commercial quantities as discovery is now defined." (Tr. 479).
>
> "It is my opinion that when I acquired the two claims that -- the four claims, really, the Jesse D., Mayflower placer, Mayflower lode, Rose Hill placer claims, that a discovery had been made that it contained a valuable mineral that is an uncommon variety of tuff in commercial quantities; that the tuff was useful for abrasives and had particular qualities of abrasiveness that no other similar type material had.
>
> It was adaptable for ceramics use and was also adaptable for absorbent and other uses associated with fur care of chinchillas and other animals. The original use of the tuff was no different from the present use." (Tr. 483-484).
>
> "The abrasive use in soap -- Lava soap -- is the same type of use as was reported to have been used, and that is as a cleanser similar to Old Dutch cleanser.
>
> The porosity and absorption qualities adapted it to animal litter.
>
> One other unique quality of the material, based upon Mr. Harris' analyses, is that it has trace minerals other than silica in it that makes it adaptable for use in viticulture and horticulture.

> The value in place of the material, in my opinion, is in excess of $1.00 a ton. The testimony has indicated that the Department of the Interior gets a royalty of $1.00 a ton now for the same tuff. If the material is worked and processed by an operator, it could easily yield a profit at a price of -- well, retail price of between $50 and $80." (Tr. 484-485).

On cross-examination, he stated that the material discovered is one known as tuff, siliceous kaolin, or aluminum silicate. In the years preceding his lease to Mr. Harris, 1971, he did not lease minerals on any of these claims to anyone else. He did solicit bids. Negotiations resulting in the Harris lease were carried on for at least six years. The total tonnage taken from the property by Harris was 46-1/2 tons. The royalty of ten cents per ton was not paid. Mr. Harris paid him ten dollars when he executed the lease.

He stated:

> "It was reported to me that up until 1930, it was used in connection with the production of cleansers. First Bridget Cleanser and then an unnamed cleanser -- I think Gates Cleanser, they called it.
>
> Then, sometime around 1960 -- maybe a little before or a little after -- the son-in-law of Eugene S. Gates, Sr., mined quite large quantities of the material as a carrier for sulfur. He had a sulfur mine up in Nevada and he mined the stuff -- I am sure it was out of the tunnel -- and put it in piles and then he was raising money by selling these piles of mined ore and giving people a mortgage on them until the SEC stopped him, and he owed that money to Argentum, but they never got paid." (Tr. 505).

He stated that at least $400 worth of annual assessment work has been done on the contested claims since 1950, about $10,000.00, and that either he or Mr. Harris did the requisite assessment work since their lease of 1971.

Norman Harris, recalled as a witness for the Contestee, testified that he received an invitation to bid on material from Procter and Gamble, Exhibit BBB. He had not yet responded. The last price he quoted was

$62.50 for Long Beach and $54 per ton for Chicago. The company requested 2,030 tons.

The coarser material of the gray tuff is processed and has been sold for four or five years as Blue Cloud Cage Litter. The same material is sold for chew blocks. Between May and October, 1975, he had sold 202-1/2 tons of gray tuff for $17,417.00. A portion of that tonnage, 44 tons, came from Forest Service lands.

He had removed no material from the contested claims between May and October, 1975. His patented Blue Cloud claims embrace 120 acres of land. One hole drilled on the patented claims, and one nearby, indicated that material of the type saleable to Procter and Gamble is deposited thereon. "However, the economics of removing it from below the surface versus near or at the surface, is such that we have not considered that at this time." (Tr. 527). The material that was sold to Procter and Gamble came from the Jessie D. lode claim. Comparable material is present on his patented claims. He did not estimate the economic effect of supplying the Procter and Gamble material from his patented claims because the material on the patented claims is below the surface and the cost would be much more than removing it at or near the surface as it is deposited on the Rose Hill claim. He did not know if he would be in a position to supply material from his patented claims to Procter and Gamble because it would involve more costs. (Tr. 529). If he did submit a quote to Procter and Gamble, it would be for the material exposed on the Jessie D. and Rose Hill claims. Procter and Gamble is presently receiving its pumice from New Mexico.

He had made offers, but no sales, to Pacific Clay Products, which obtains its clay from a very large deposit in Alberhill, near Lake Elsinore. (Tr. 532).

The latest Procter and Gamble invitation for a bid, Exhibit BBB, for 2,000 tons, would bring a net royalty of $200.00 to the mining claimant. The demands of Pacific Clay might be 33,000 tons per year.

He estimated that two tons of tuff would have to be mined for each ton processed. The material would be removed from outcroppings with a backhoe. He had not made a determination at which point the extent of overburden relative to removable material would render the operation uneconomical. (Tr. 541).

After submitting significant sworn testimony of the occurrence and actual removal of gold from the claims, the Contestee, in his answering brief, agrees that the inquiry could be limited in this case to the tuff or what has been referred to as aluminum silicate.

Allegations similar to five of the allegations set forth in the Answer, (1) Failure to state a claim upon which relief can be granted; (2) That the Contestant is estopped from claim that the claims are invalid; (3) Denial of due process; (4) Waiver of right to contest the validity of the claims; and (5) Contestee, having held and worked the claims for more than five years, had established a right to patents under 30 U.S. Code § 38 which the Contestant has no right to impair, have previously been held to be without merit by the Interior Board of Land Appeals. These alleged affirmative defenses, as well as the others set forth in the Answer, appear to be without merit. (See United States v. Aloys A. Dietemann and Doris E. L. Dietemann, 26 IBLA 356 (1976), and cases cited therein).

The lands embraced by the claims were included in an area withdrawn from mining location by an Act of May 29, 1928, 45 Stat. 956. Section 2 of the Act provided that the Act "shall not defeat or affect any lawful right which has already attached under the mining laws and which is hereafter maintained in accordance with such laws * * *."

Under the mining laws of the United States (30 U.S.C. § 22 et seq. (1970)) a valid location of a mining claim requires discovery of a valuable mineral deposit within the limits of the claim. The rule as to what constitutes a valid discovery has been stated as follows:

> * * * Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. * * *. Castle v. Womble, 19 L.D. 455, 457 (1894); Chrisman v. Miller, 197 U.S. 313 (1905); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963).

The ultimate burden of proving discovery is always upon the mining claimant. United States v. Springer, 491 F. 2d 239, 242 (9th Cir.), cert. denied, 419 U.S. 234 (1974).

In United States v. Frank W. Winegar, et al., 81 I.D. 370 (1974), the Interior Board of Land Appeals held, in part:

> In the years since promulgation of the prudent man test, the Department has found it necessary to state explicitly that for a mineral deposit

to be considered valuable it must be capable of extraction, removal and marketing at a profit. This test of marketability has been approved by the Supreme Court in United States v. Coleman, 390 U.S. 599, 602 (1968), as a logical complement to the prudent man test:

> * * * Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent man test, and the marketability test which the Secretary has used here merely recognizes this fact.

The ruling in Coleman, approving the marketability test employed by the Department, is and has always been applicable to all mining claims. Converse v. Udall, 399 F. 2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969), and cases cited therein at pp. 621-22.

In addition to the prudent man test and its logical complement, the marketability test, the Department has developed several standards to aid in the determination of value.

First, it must appear as a present fact that there would be a reasonable prospect of success in developing an operating mine that would yield a reasonable profit. Castle v. Womble, supra; Davis's Adm'r. v. Weibbold, 139 U.S. 507, 523 (1891). Speculation with respect to future changes in market conditions, dramatic breakthroughs in technology, or the hoped-for discovery of a mother lode will not demonstrate as a present fact that a prudent man would be justified in initiating actual mining operations. Foster v. Seaton, 271 F. 2d 836, 838 (D.C. Cir. 1959).

If marketability could be predicated upon possibilities of the future, the variables introduced would be endless. Since few, if any, of these variables are susceptible to reasonable predictability,

the marketability test would be reduced to mere speculation, and any meaningful conclusion as to value would disappear in a sea of conjecture.

A second standard is that actions of others in the same or very nearly the same circumstances may be used as evidence of what would constitute prudent investment activity. For example, a mining claimant would be justified in initiating actual mining operations on mineral showings that are the same or very nearly the same as those where actual mining operations have been successfully brought to fruition by others. See, e.g., Cascaden v. Bortolis, 162 F. 267, 270 (9th Cir. 1908).

In the same manner, failure to undertake actual operations may be used as evidence that no prudent man would be justified in so doing. For instance, if mining claimants have held claims for several years and have attempted little or no development of actual operations, a presumption may be raised that there has been no discovery of a valuable mineral deposit. This was the case in Cameron v. United States, supra, where six years had elapsed from the date of location to the date of the hearing. There the Supreme Court stated at 457:

> * * * Sufficient time has elapsed since these claims were located for a fair demonstration of their mineral possibilities.

For similar holdings, see United States v. Ruddock, 52 L.D. 313 (1927), where 17 years had elapsed without production; Starks v. Mackey, 60 I.D. 309 (1949), 29 years; United States v. White, 72 I.D. 522 (1965), 38-39 years; and United States v. Flurry, A-30887 (March 5, 1968), where the Department stated:

> * * * the most persuasive evidence as to what a man of ordinary prudence would do with a particular mining claim is what men have, in fact, done or are doing, not what a witness is willing to state that a prudent man would do.

> Even if the mining claims are supported by a valid discovery, it is clear that a discovery may be lost. We have frequently held that discovery may be "lost" due to exhaustion of the deposit or to changes in market conditions of substantial duration. Best v. Humboldt Placer Mining Co., supra, citing with approval United States v. Logomarcini, 60 I.D. 371, 373 (1949), and United States v. Houston, 66 I.D. 161, 165 (1959). See also Mulkern v. Hammitt, 326 F. 2d 896 (9th Cir. 1964); Adams v. United States, 318 F. 2d 861, 871 (9th Cir. 1963).

Where demand is limited to a very few customers who supply their needs from their own sources, so that the market is "closed" or "captive", the Interior Board of Land Appeals has held that a mining claimant must prove that the consumers will buy the product of his claim at a profit, failing which it will be assumed that his mineral deposit has no economic value and does not qualify as a discovery. United States v. Duval, 1 IBLA 103 (1970), aff'd. Duval v. Morton, 347 F. Supp. 501 (D. Oregon 1972); United States v. Bartlett, 2 IBLA 274, 78 I.D. 173 (1971).

Proof of actual sales of minerals from a mining claim is not an indispensable element in establishing their marketability. While lack of development and sales may raise a presumption that the market value of the minerals found thereon was not sufficient to justify the cost of their extraction, this presumption may be overcome by evidence showing that the minerals could have been extracted, removed, and marketed at a profit at the time of withdrawal. Verrue v. United States, 457 F. 2d 1202 (9th Cir. 1972), reversing United States v. Verrue, 75 I.D. 300 (1968).

Where land is withdrawn from the operation of the mining laws subsequent to the location of a mining claim, the validity of the claim cannot be recognized unless the claim was supported by a valid discovery at the time of the withdrawal. See Cameron v. United States, 252 U.S. 450 (1920); United States v. C. F. Snyder, et al., 72 I.D. 223 (1965), aff'd. 405 F. 2d 1179 (10th Cir., 1968); United States v. Warren E. Wurts, et al., 76 I.D. 6 (1969); United States v. A. P. Jones, 2 IBLA 140 (1971).

Even though there may have been a proper discovery at the time of a withdrawal or at some other time in the past, a mining claim cannot be considered valid unless the claim is presently supported by a sufficient discovery. The loss of the discovery, either through exhaustion of the minerals, changes in economic conditions, or other circumstances, results in the loss of the location. See Gwillim v. Donnellan, 115 U.S.

45 (1885); Mulkern v. Hammitt, supra; United States v. Ruth Arcand, 23 IBLA 226 (1976); see also Converse v. Udall, 399 F. 2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969); United States v. Menzel G. Johnson, 16 IBLA 234 (1974); United States v. Gunsight Mining Company, 5 IBLA 62 (1972).

In Converse v. Udall, supra, the court held that it was proper to limit the inquiry to what minerals had been found on the date of withdrawal and approved the exclusion of evidence relating to areas not exposed on the date of withdrawal but exposed thereafter.

The Contestee has established that several thousand tons of tuff were removed from extensive deposits on the Jessie D. claim during the years 1920 to 1930 and marketed as a cleansing powder. Sales of Bridget Cleanser, the principal product, terminated in 1923 or 1924. However, according to the testimony of Mr. Gates, that entire operation resulted in a net loss. As late as the date of the hearing, no tuff had ever been removed from the Mayflower placer or Mayflower lode claims.

The evidence does not prove that there was a profitable mining operation on the claims as of the date of the withdrawal. How long does a prudent person continue to operate a mine at a loss? In this case, the Gates family terminated its unprofitable operation in 1930, after considerable effort and a large sum of money had been expended over a period of ten years vainly pursuing a reasonable prospect of developing a paying mine.

As stated in the Contestee's brief, there has been a continuing market for tuff for use as cleansing powder since 1930. That market has been supplied from other sources. There is no evidence in the record to show whether the competing cleanser companies, or the soap companies in Los Angeles, had their own captive mineral deposits, as did the Gates family while it produced cleanser. If the other companies did not have their own deposits, it is possible that the subject tuff could have been sold to them before and after the withdrawal. For twenty years, between 1930 and 1950, tuff was not removed from the subject deposits nor from similar deposits on adjoining lands.

It was not until 1950 that the Harris family developed a new market for tuff, chinchilla dust. That market was, up to the time of the hearing, supplied from the adjacent Swartz deposit, deposits on Forest lands, and on adjacent claims on which Harris received patent through the Bureau of Land Management. Although the Contestee has had control of the claims since 1962 (Exhibit No. 17), he did not enter into a lease with Dr. Harris until 1971. No significant amount of material was actually removed pursuant to the lease until 1974. It was removed from the Jessie D. claim and used not as cleanser but, for the first time, as an ingredient of soap. Admittedly, the Contestee has received only ten dollars on the lease, and accumulated unpaid royalties total $4.65.

The new market for chinchilla litter and chew blocks came into existence after 1970, more than forty years following the withdrawal.

There is insufficient evidence in the record to support a finding that the subject deposits were marketable at a profit as of the date of the withdrawal. Indeed, the tuff was marketed at a loss. Assuming, arguendo, that the unprofitable sale of several thousand tons of tuff did impart some element of marketability to the deposits on that date, the Contestee, in order to preclude the attachment of the withdrawal, must demonstrate continuous marketability to the time of the hearing. The evidence shows a span of twenty years, 1930 to 1950, during which there were no sales and apparently no demand for these, or adjoining, tuff deposits. During that extended period of time, the withdrawal would attach. Moreover, a second period of more than twenty years, 1950 to 1974, transpired before tuff was actually removed from the Jessie D. claim. To hold that the claims did not lapse into the withdrawal while the subject tuff deposits remained undisturbed from 1930 to 1974 would render the withdrawal meaningless.

It is concluded that the subject claims lapsed into the withdrawal for the reason that many years elapsed after 1930 without development of, or production from, the deposits exposed thereon.

Since the foregoing conclusion is dispositive of this proceeding, it is not necessary to rule on the other issues raised by the pleadings.

The Rose Hill and Mayflower placer mining claims and the Mayflower and Jessie D. lode mining claims are hereby declared null and void.

R. M. Steiner
Administrative Law Judge

Enclosure: Information Pertaining to Appeal Procedures

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